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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

In re Petition of MARTIN LUDWIG COHNSTAEDT
for Naturalization,

Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR PETITIONER

The Opinion Below

The opinion of the Supreme Court of Kansas is officially reported in 167 Kan. 451.

Statement on Jurisdiction

Certiorari was granted by this Court on December 5, 1949, to review a judgment of the Supreme Court of the State of Kansas. The jurisdiction of this Court is invoked under Section 1257(3) of the United States Judicial Code.

Statement of the Case

Petitioner's application for naturalization pursuant to the Nationality Act of 1940 was opposed in the District Court of Barton County, Kansas by the Immigration and Naturalization Service of the United States Department of Justice upon the ground that petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law" (5).

After a hearing the Trial Court first granted the petition (6), but after reconsideration denied it without giving any reason for such denial (7). That second decision was affirmed by the Kansas Supreme Court, the highest court of that state (29).

The objection to the naturalization of petitioner rested entirely upon his pacifist views. Petitioner, who is a Quaker (14), was born in Germany in 1917 (9). He left Germany in 1934 for England and came to this country from England in 1937 (10). In this country he has worked primarily as a farmer and has obtained a degree of B.S. in Agriculture from Rutgers University (10). In 1946, he worked in Poland under the auspices of UNRRA and since then has taught at Sterling College, Kansas (11). He is married to an American citizen (12). Petitioner has subscribed to the principles enunciated in the Constitution of the United States and has announced his willingness to renounce his allegiance to the German State (12).

In World War II petitioner had been recognized by the draft authorities as a conscientious objector and given a 4E classification (17).

Petitioner expressed the opinion that in a Christian nation the armed services were not necessary (13). He said: "I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed con-

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flict" (15). He was asked whether he would be willing to work in munitions factories in time of war and said no (15).

However, petitioner stated that he would be willing to help remove wounded from the battlefield, but would not be willing to deliver munitions to men at the front (15). While he objected to becoming a member of the Armed Forces, he said he would not object to wearing a uniform if that were possible without his becoming such member (16).

Petitioner said: "I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs" (14).

Petitioner's application for citizenship was supported by the President Emeritus of Sterling College (19), and by a minister of the Congregation Christian Church of Partridge, Kansas (21).

The Supreme Court of Kansas upheld the denial of petitioner's application solely because he was "not willing to serve in the army as a non-combatant" (32).

The Question Presented

Was petitioner properly denied the right to be naturalized as a United States citizen by the state courts of Kansas because of his conscientious scruples against war and its associated activities even though he conformed to the legal standards of conduct that have been to date demanded of United States citizens?

Specification of Error

The Kansas Supreme Court erred in denying petitioner's application for citizenship.

ARGUMENT

POINT I

A willingness to perform non-combatant services is not a requisite for citizenship.

The Kansas Supreme Court denied petitioner's application for citizenship only because it found that he was unwilling to serve in the army as a non-combatant. The state court pointed to no provision of law or decision of this Court which required such a conclusion. It appeared, however, to believe that this Court intended to reach such result by its decision in *Girouard* v. *United States*, 328 U. S. 61, because it noted that in that case the applicant for citizenship had been willing to serve in the army as a non-combatant. While that was the fact, we submit it was not a controlling element in the decision. Nor has it been so considered in the federal courts.*

There is nothing either in the opinion of this Court in the *Girouard* case or in the relevant statutes which justifies the position taken by the Kansas court. On the contrary, a proper interpretation of the statutes compels a holding that no distinction can properly be made between combatant and non-combatant conscientious objectors in connection with an application for citizenship in which the applicant is not seeking the benefit of any special consideration.

There are three groups of statutes which should be considered in this connection, the relevant parts of which are given in the appendix: the general provisions which regulate naturalization and which prescribe the oath of renunciation and allegiance (8 U. S. C. 707(a) and 735); the

* In *Application of Wiebe*, 82 F. Supp. 130, Judge Delehant admitted a Mennonite applicant who refused to perform non-combatant military service. Cf. *Application of Boulding*, where, in the District Court for the Southern District of Iowa (Central Division, Case No. 4388) on the authority of the *Girouard* case, Judge Dewey admitted a Quaker who, like petitioner, was unwilling to perform non-combatant service (Tr. 45).

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special provisions permitting certain alien veterans to become citizens without compliance with all of the requirements imposed on aliens generally (8 U. S. C. 723a, 1001, 1004), and the provisions of the draft laws which deal with conscientious objectors (50 U. S. C. App. 305(g), 456(j)).

The general statutes (quoted at pp. 9, 10) contain nothing which suggests any distinction between aliens willing to serve in the armed forces, whether as combatants or as non-combatants, and those wholly unwilling to serve in the armed forces. That was in effect recognized by this Court in the *Girouard* case. There Mr. Justice Douglas, after quoting the required oath in full, noted that this oath made no such distinction (328 U. S. at 67, 68). The logic which there led this Court to reject the view formerly held by it that an alien must be willing to bear arms to become a citizen requires also a rejection of the state court's view in the instant case that an alien applicant for citizenship must be willing to serve in the armed forces. That this Court intended so to rule seems clear from its repudiation of the *Schwimmer* and *Macintosh* cases (279 U. S. 744 and 283 U. S. 605) and its reliance (328 U. S. at 64-68) on the dissents of Mr. Justice Holmes and Mr. Chief Justice Hughes in those cases.

In the *Schwimmer* case (as Mr. Chief Justice Stone noted in his dissent in 328 U. S. at 72, note 1) the applicant for citizenship was, like petitioner here, unwilling to perform any military service whether combatant or non-combatant. In the *Macintosh* case (see 283 U. S. at 618), the applicant went further than this petitioner has gone, for he reserved the right to judge for himself whether a particular war was a just one. On the other hand, the situation of petitioner is very like that of the applicant in *United States* v. *Bland*, 283 U. S. 636, who was willing to do whatever was required of her, but only "as far as my conscience as a Christian will allow" (Cf. petitioner's statement quoted above, that he will do what is required, if not in conflict with his Christian beliefs).

We cannot but believe that in overruling all these cases this Court accepted, although it did not quote, these words of Mr. Chief Justice Hughes:

> "• • • There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence" (283 U. S. at 634).

To interpret the oath as imposing an obligation to give non-combatant services, as the state court has done here, is as much a misinterpretation as the now repudiated concept that it imposes an obligation to fight.

We submit, moreover, that the second group of laws we have above referred to indicates that Congress did not intend the naturalization oath to have the meaning imputed to it by the state court here. In 1942 Congress enacted two provisions to expedite the naturalization of alien veterans (8 U. S. C. 723a, 1001, 1004, quoted at pp. 10-12), both of which exempt such veterans from certain of the requirements imposed on all aliens. But neither provision modifies those parts of the general law which require an applicant to be attached to the principles of the Constitution and to take oath to support and defend the Constitution and laws. Yet Congress explicitly excluded from the benefit of these expediting provisions any "conscientious objector who performed no military duty whatever or refused to wear the uniform".

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It is clear, of course, that had petitioner claimed the benefit of these expediting provisions he would have been barred. But he has not claimed any such benefit and has proceeded on the basis of the general law. Thus he showed that he lawfully entered the United States, that he resided there for at least ten years (4), and that he was able to speak the English language (5)—none of which showing would have been necessary had he applied under the special section (Cf. 8 U. S. C. 1001, and 8 U. S. C. 704, 732). But the fact that Congress has deprived a certain group of aliens of the right to these expediting provisions cannot be used to justify an inference that Congress intended to bar the same group from citizenship under the general law. Had Congress intended to do that it would have made the provisos a part of the general law, not part of the special expediting provisions. The very fact that these provisos were inserted in the expediting provisions indicates that except for such provisos the excluded category of aliens would have been eligible even for the special privileges.

Certainly if the contention of the state court were correct that a person like petitioner is automatically barred from citizenship because of his supposed lack of attachment to the Government, or inability to take the oath without reservations, it would not have been necessary for Congress expressly to have excluded such a person from the special privileges. It must be borne in mind that a person claiming those privileges must take the same oath and show the same attachment to the Constitution as anyone else. Since Congress saw fit to exclude aliens of a certain category from the special privileges but not from all right to become citizens, no court can hold a person coming within that category to be disqualified from citizenship when he claims no special privilege.

Finally, we call attention to the fact that Congress, in the various Selective Service laws (50 U. S. C. App. 305(g), 456(j), quoted at pp. 12, 13), has consistently recognized the right of conscientious objectors to refuse even non-

combatant service. The 1940 and 1948 Acts both provided for exemption from non-combatant service of draftees who had conscientious religious scruples against such service. Under the earlier law, a person given the exempt status was required to perform work of national importance under civilian supervision—petitioner indeed came within this category in 1941 (17). Under the current law a person exempted because of unwillingness to perform even non-combatant service is totally deferred. It is plain, therefore, that Congress has consistently recognized that the call of conscience justifies a person in refusing to serve even as a non-combatant.

Never in our history has Congress compelled a religious conscientious objector such as petitioner to enter the armed services. It is difficult to see, therefore, how it can be argued that a person who complies with the law as enacted by Congress can be characterized as lacking attachment to the Constitution and laws of the United States.

CONCLUSION

Absent the disqualification improperly imposed by the state court there can be no question but that petitioner is qualified to become a citizen. He is a member of the Society of Friends (14) whose value as citizens has been attested by members of this Court. As Justice Holmes said in his dissent in the *Schwimmer* case, 279 U. S. at 655:

> "• • • And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

Cf. Mr. Justice Black dissenting in *In re Summers*, 325 U. S. at 575.

We submit, therefore, that the decision of the Kansas Supreme Court is contrary to the Nationality Act and at variance with the intent of Congress and the views of this Court. The judgment under review should be reversed and petitioner admitted to citizenship.

Respectfully submitted,

OSMOND K. FRAENKEL,
Attorney for Petitioner.

APPENDIX

Nationality Code, Title 8

§ 707. Eligibility for Naturalization; Residence. (a) No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

§ 735. Oath of renunciation and allegiance.

(a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of the naturalization of a child under the provisions of Sections 715 or 716 the Naturalization Court may waive the taking of such oath if in the opinion of the Court the child is too young to understand its meaning.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgement whereof I have hereunto affixed my signature.

§ 723a. Naturalization of persons serving in the armed forces of the United States during World War I and earlier wars.

A person who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, or at any time after April 20, 1898, and before July 5, 1902, or who served on the Mexican Border as a member of the regular Army or National Guard from June, 1916, to April, 1917, who is not an alien ineligible to citizenship, who was not at any time during such period or thereafter separated from such forces under other than honorable conditions, who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform, and who was not at any time during such period or thereafter discharged from the military or naval forces on account of his alienage, shall, if he has resided in the United States continuously for at least two years pursuant to a legal admission for permanent residence in lieu of the usual five years' residence within the United States and six months' residence within the State of his residence at the

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time of filing the petition for naturalization, during all of which two-year period he has behaved as a person of good moral character, be entitled at any time within one year after December 7, 1942, to naturalization upon compliance with all of the requirements of the naturalization laws, except that——

(1) no declaration of intention shall be required;

(2) no certificate of arrival shall be required unless such person's admission to the United States was subsequent to March 3, 1924; and

(3) no residence within the jurisdiction of the Court shall be required.

* * * * * *

§ 1001. Exception from certain requirements.

Notwithstanding the provisions of Sections 703 and 726 of this title, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during World War II and who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet

any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: • • •

§ 1004. Persons excepted from subchapter; revocation of citizenship upon dishonorable discharge.

The provisions of this subchapter shall not apply to (1) any person who during World War II is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform: *Provided*, That citizenship granted pursuant to this subchapter may be revoked as to any person subsequently dishonorably discharged from the military or naval forces in accordance with Section 738 of this title; and such ground for revocation shall be in addition to any other provided by law.

Selective Service Act of 1940,
Title 50, App.

§ 305(g). Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. • • •

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Selective Service Act of 1948,
Title 50, App.

§ 456(j). Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred. * * *